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263 NLRB No. 156

D--9221
Farmington, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEDNIS WRECKING,
INCORPORATED

and

Case 7--CA--18639

LOCAL 324, INTERNATIONAL
UNION OF OPERATING
ENGINEERS, AFL--CIO

DECISION AND ORDER

Upon a charge filed on December 11, 1980, by Local 324, International Union of Operating Engineers, AFL--CIO, herein called the Union, and duly served on Mednis Wrecking, Incorporated, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on January 27, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. On March 3, 1981, Respondent filed an answer to said complaint admitting in part and denying in part the allegations

of the complaint. On April 29, 1982, Respondent advised counsel for the General Counsel that its answer would be withdrawn and no other answer would be filed. On May 3, 1982, Respondent withdrew its answer. On April 29 and May 18, 1982, counsel for the General Counsel verbally advised Respondent of the consequences of such action.

On May 25, 1982, counsel for the General Counsel filed directly with the Board a motion to transfer the case to the Board and for default summary judgment, with attachments. The General Counsel moved that: (1) the case and motions be transferred to the Board and ruled on immediately so that, in the event that they are granted, the necessity for and the expense of a hearing will be obviated; (2) all allegations of the complaint be deemed to be admitted to be true and so found by the Board and that Respondent be found to have violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, without the taking of evidence in support of the complaint; and (3) that the Board issue a decision containing findings of fact, conclusions of law, and an Order, all consistent with the allegations in the complaint, and prayer for relief set forth therein. Subsequently, on June 3, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel Motion for Summary Judgment should not be granted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent specifically states that unless an answer was filed to the complaint within 10 days from the service thereof ''all of the allegations in the Complaint shall be deemed to be admitted true and may be so found by the Board.'' Although Respondent filed a timely answer, it subsequently withdrew its answer.[1] The withdrawal of an answer necessarily has the same effect as a respondent's failure to file an answer.[2]

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[1] Attached to the Motion for Summary Judgment, the allegations of which stand uncontroverted by failure to respond to the Notice To Show Cause, is a copy of the Respondent's withdrawal of its answer.

[2] Newark Pipeline Company, 202 NLRB 234 (1973); Nickey Chevrolet Sales, Inc., 199 NLRB 411 (1972).

Since Respondent has withdrawn its answer, the allegations of the complaint are deemed to be admitted to be true and are so found to be true in accordance with the Board's Rules and Regulations. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[3]

On the basis of the entire record, the Board make the following:

Findings of Fact

I. The Business of Respondent

At all times material herein, Respondent, a Michigan corporation, has maintained its principal office and place of business at 27527 W. 14 Mile Road, Farmington, Michigan, and has been at all times material herein engaged in demolition and renovation work. Respondent's Farmington office and its various jobsites located in Michigan are the only facilities involved in this proceeding.

During the year ending December 31, 1980, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, performed services valued in excess of $500,000, of which services valued in excess of $50,000 were performed for Darin and Armstrong, Inc., a general contractor. During the same period of time, Darin and Armstrong, Inc., operating as a general contractor, performed services valued in excess of $50,000, of

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[3] Eagle Truck and Trailer Rental Division of E. T. & T. Leasing, Inc., 211 NLRB 804 (1974).

Since Respondent has withdrawn its answer, the allegations of the complaint are deemed to be admitted to be true and are so found to be true in accordance with the Board's Rules and Regulations. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[3]

On the basis of the entire record, the Board make the following:

Findings of Fact

I. The Business of Respondent

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[3] Eagle Truck and Trailer Rental Division of E. T. & T. Leasing, Inc., 211 NLRB 804 (1974).

which services valued in excess of $50,000 were performed in and for enterprises located in States other than the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been, at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 324, International Union of Operating Engineers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Collective-Bargaining Representative

1. The unit

The following employees of Respondent constitute a unit of employees appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees engaged in the operation of power driven or power generating construction equipment used in building or alteration of all structures and engineering works, but excluding guards and supervisors as defined in the Act.

2. The bargaining history

At all times since 1970, by virtue of successive collective-bargaining agreement between Respondent and the Charging Party, and, continuing to date, the Charging Party has been the exclusive representative for the purposes of collective bargaining of the employees in the unit described above in

section III, A, paragraph 1, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all employees in said unit for the purposes of collective bargaining with respect of rates of pay, wages, hours of employment, and other terms and conditions of employment.

3. The collective-bargaining agreement

The collective-bargaining agreement currently in effect between Respondent and the Charging Party, provides for, inter alia, the remittance by Respondent of payments into certain fringe benefit funds including health care, pension, retiree benefit, vacation, apprentice, and advancement or promotion, established for the benefit of employees of signatory employers to said agreement.

B. Violations of Section 8(a)(1) and (5)

1. Since or about June 11, 1980, and continuing to date, Respondent has failed and refused to bargain with the Charging Party by unilaterally and without notice to the Charging Party failing to make full and proper fringe benefit contributions pursuant to the collective-bargaining agreement described above, in section III, A, paragraphs 2 and 3.

2. By the acts described in section III, B, paragraph 1, and by each of said acts, Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in exercise of rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By the acts described in section III, B, paragraph 1, above, and by each of said acts, Respondent did refuse to bargain collectively and is refusing to bargain collectively with the representative of its employees, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, we shall order that it take certain affirmative action designed to effectuate the policies of the Act.

We shall order Respondent, upon request by the Union, to give effect to the collective-bargaining agreement retroactively from June 11, 1980, and to make the employees whole for any losses they incurred as a result of the Respondent's refusal to abide by the terms of such agreement.[4]

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[4] This involves making whole the appropriate fringe benefit funds including health care, pension, retiree (continued)

Conclusions of Law

1. Mednis Wrecking, Incorporated, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 324, International Union of Operating Engineers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees engaged in the operation of power driven or power generating construction equipment used in building or alteration of all structures and engineering works, but excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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[4] benefit, vacation, apprentice, and advancement or promotion, for any losses suffered by Respondent's unlawful refusal to abide by and give retroactive effect to the contract. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage and question whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference of provisions in the documents governing the funds at issue and, where there are no governing provisions, by evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. Merryweather Optical Company, 240 NLRB 1213 (1979).

Further, as the record herein is not clear as to whether or not the contractually mandated contributions to the fringe benefit funds, or any part thereof, constitute payment to an industrial advancement program, we shall defer to the compliance stage the question as to whether any of the contributions is a permissive subject of bargaining for which we will not require Respondent to make delinquent and future payments. See Finger Lakes Plumbing & Heating Co., 254 NLRB 1399 (1981).

4. At all times since 1970, by virtue of successive collective-bargaining agreements between Respondent and the Union, and continuing to date, the Union has been, and is now, the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since on or about June 11, 1980, and continuing to date, Respondent failed and refused to bargain with the Union by unilaterally and without notice to the Union failing to make full and proper fringe benefit contributions to benefit funds including health care, pension, retiree benefit, vacation, apprentice, and advancement or promotion, established for the benefit of Respondent's employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders

that Mednis Wrecking, Incorporated, Farmington, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 324, International Union of Operating Engineers, AFL--CIO, in the following appropriate unit:

> All employees engaged in the operation of power driven or power generating construction equipment used in the building or alteration of all structures and engineering works, but excluding guards and supervisors as defined in the Act.

(b) Failing and refusing to honor and abide by the terms and conditions provided for in the collective-bargaining agreement described in section III, 4, above, including but not limited to unilaterally discontinuing making full and proper payments into certain fringe benefit funds including health care, pension, retiree benefit, vacation, apprentice, advancement or promotion, pursuant to said collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Honor and abide by the terms and conditions of employment provided for in the collective-bargaining agreement with Local 324, International Union of Operating Engineers, AFL--CIO.

(b) Upon request by the Union remit it all fringe benefit payments which would have been remitted but for Respondent's failure to honor and abide by the collective-bargaining agreement, with interest thereon to be computed in the manner set forth in the section herein entitled ''The Remedy.''

(c) Make whole the employees in the above unit for any losses they may have incurred as a result of the Respondent's refusal to pay into the fringe benefit funds described above.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount due under the terms of this Order.

(e) Post at each of its locations where unit employees work copies of the attached notice marked ''Appendix.''[5] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(f) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 17, 1982

John R. Van de Water, Chairman

Howard Jenkins, Jr., Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 324 International Union of Operating Engineers, AFL--CIO, in the following appropriate unit:

> All employees engaged in the operation of power driven or power generating construction equipment used in building or alteration of all structures and engineering works, but excluding guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to honor and abide by the terms and conditions provided in the collective-bargaining agreement with Local 324, International Union of Operating Engineers, AFL--CIO, by unilaterally discontinuing making full and proper payments into certain fringe benefit funds including health care, pension, retiree benefit, vacation, apprentice, and advancement or promotion pursuant to said collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL honor and abide by the terms and conditions of employment provided for in collective-bargaining agreement with Local 324, International Union of Operating Engineers, AFL--CIO.

WE WILL, upon request, by Union, remit to the aforesaid Union all fringe benefit funds which would have been remitted but for our failure to honor and abide by the collective-bargaining agreement; and WE WILL make whole our employees, in the above unit, for any loss they may have incurred as a result of our refusal to pay into the fringe benefits funds described above.

MEDNIS WRECKING, INCORPORATED

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit, Michigan 48226, Telephone 313--226--3244.